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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 318

VIOLA HALL MOORE, ADMINISTRATOR OF THE ESTATE OF LOUIS LEE MOORE, JR., DECEASED,

Petitioner,

v.

THE CHESAPEAKE & OHIO RAILWAY COMPANY,
A DOMESTIC CORPORATION

Defendant

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF ON BEHALF OF THE PETITIONER

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I

Opinions of the Courts Below

For opinion of the United States Court of Appeals, for the Fourth Circuit (R. 86), see 184 F. 2d 176.

For memorandum opinion of the District Court of the United States, for the Eastern District of Virginia, see Record 69.

II

Jurisdiction

The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254. The judgment of the United States Court of Appeals, for the Fourth Circuit, to be reviewed, was entered on August 10, 1950 (R. 91).

III

Statement of the Case

Plaintiff's decedent lost his life in the performance of his duties as a brakeman of The Chesapeake & Ohio Railway Company, while both he and the Company were engaged in interstate commerce. He left a widow and four small children, ranging in ages from 3 to 10 years. She qualified on his estate, and sued the Company for damages under the Federal Employers' Liability Act (45 U. S. C. A., Section 51, et seq.) in the District Court, for the Eastern District of Virginia. She alleged, and evidence adduced on her behalf tended to show, that while the decedent was standing on the footboard of an engine tender, engaged in the performance of his duties as a brakeman in shifting operations, the engineer made a sudden stop, without notice or warning to decedent, which caused the decedent to fall from the footboard in the direction in which the engine was moving, after which the engine ran over and killed him. The defendant alleged, and evidence adduced on its behalf tended to show, that the decedent had commenced to fall before the engineer attempted to stop, and that he applied the brakes and stopped *because* he saw the decedent falling. The issue thus raised was submitted to the jury by the following language of the Court's charge:

> "If you believe from the evidence that plaintiff's decedent, Mr. Moore, was at the post of duty standing

on the footboard of the tender from which he fell and that he had not commenced to fall until the engineer applied the brakes and shut the throttle off and brought the engine to a sudden and unusual stop and that such action was without notice to Mr. Moore, then it was a negligent action which caused Mr. Moore to fall down and you should find for the plaintiff.

"On the other hand, if you find, as I said a moment ago that Mr. Moore fell either through fault of his own or due to his physical condition or for any other reason not attributable to negligence on the part of the railroad company, then your verdict, of course, should be for the defendant (R. 64).

"* * * The issue which you have before you is very narrow. It boils down to this: If you believe from the evidence that Mr. Moore was thrown from the fender as a result of the sudden stop or violent jerk which resulted from the unexpected application of brakes, then you may conclude that the defendant railroad company is liable for negligence. On the other hand, that is the only charge of negligence contained in the complaint. Unless you believe that your verdict should be for the defendant" (R. 65).

At the close of all the evidence, defendant made a motion for a directed verdict in its favor, upon the ground that the evidence was insufficient to support a verdict for the plaintiff. The Court declined to grant the motion, submitted the case to a jury, subject to a final determination of the question raised, upon the return of the verdict (R. 59-60). The jury returned a verdict for the plaintiff in the sum of $34,000.00. Upon motion of the defendant, the verdict was set aside and final judgment entered for the defendant pursuant to Rule 50 of the Federal Rules of Civil Procedure (R. 71). This judgment was affirmed by the Court of Appeals in an opinion rendered on the 10th day of August, 1950 (R. 86).

The key witness upon which the whole case turns was the

engineer, who was in charge of the engine at the time plaintiff's decedent was killed. His testimony was in part favorable to the plaintiff, and in part favorable to the defendant. The jury discarded that which was unfavorable to the plaintiff and accepted that, along with other testimony, which was favorable to her. The testimony which was unfavorable to the plaintiff and favorable to the defendant was that the engineer could see Moore in the position the latter occupied on the footboard, and that he saw Moore commence to fall before the brakes were applied. Testimony adduced on behalf of the plaintiff and admissions made by the engineer tended to show that it was physically impossible for the engineer to have seen Moore in the position he occupied on the footboard. The Court of Appeals said, "We think the evidence, fairly interpreted, shows without contradiction that he (the engineer) *could* see him (Moore)" (Emphasis supplied). We respectfully submit that the Court exceeded its powers, and usurped the function of the Jury in undertaking to "fairly interpret the evidence."

IV

Question Presented

The question, therefore, specifically brought forward is whether the courts below, by setting aside the verdict of the jury and entering final judgment for the defendant, deprived the plaintiff of an important part of the remedy afforded railroad workers under the Federal Employers' Liability Act, when to do so, the Court had to weigh contradictory evidence, draw inferences, judge the credibility of witnesses, and draw ultimate conclusions as to the facts, contrary to those drawn by the jury.

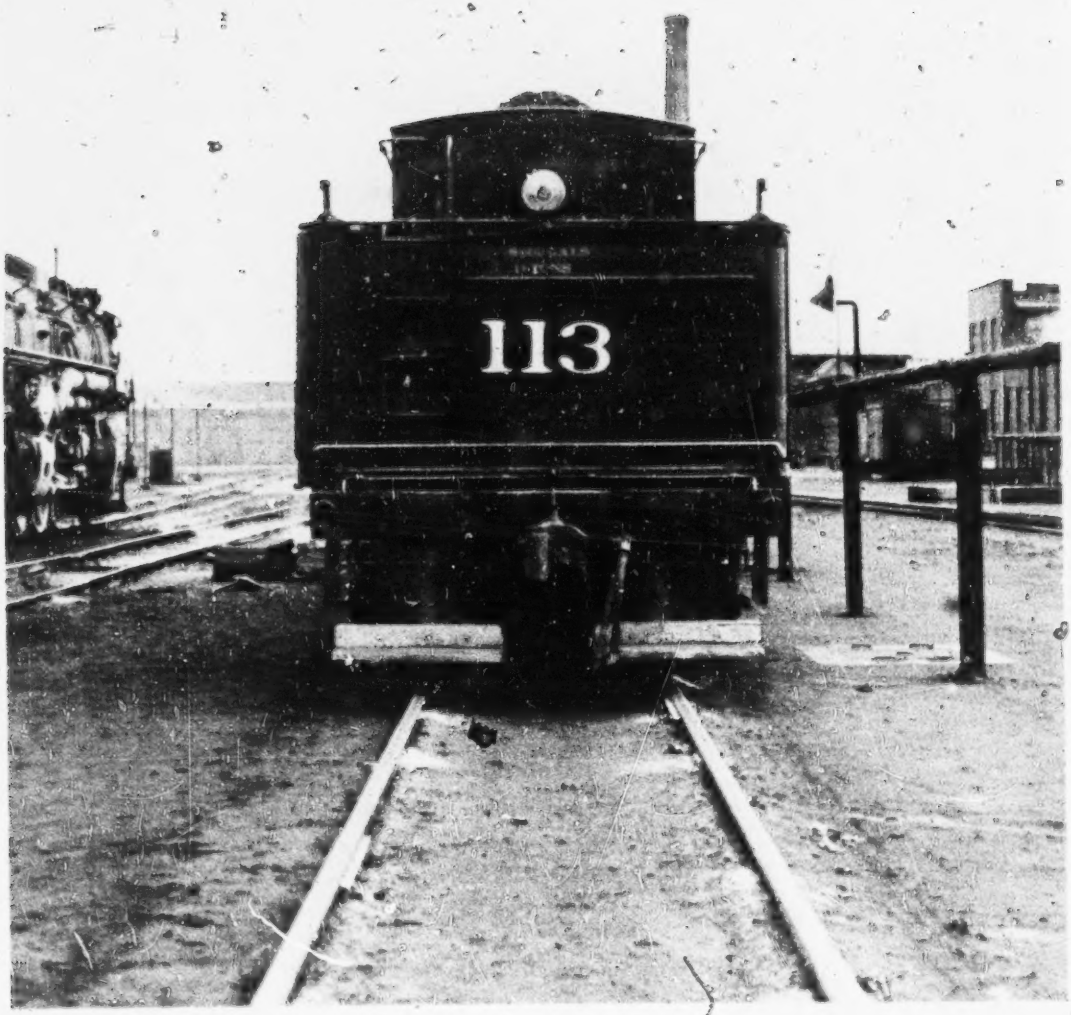
V

Argument

Our argument will be based upon facts stated pursuant to the familiar rule that the evidence tending to support the verdict must be considered and analyzed in a light favorable to the plaintiff.

Plaintiff's decedent (whom we shall refer to as "Moore") lost his life on September 25, 1948, at about three p. m. while engaged as a brakeman in shifting operations on the Fulton Yards of Defendant at Richmond (R. 19). Moore was standing on the footboard behind the tender of Engine No. 114, where he was supposed to ride in the performance of his duties as brakeman (R. 21). For purposes of clarity, we reproduce here plaintiff's exhibit No. 1, (R. 75), showing the engine and tender of 113, which the testimony shows is identical with 114 (R. 21).

(Here follows 1 Photolithograph)


113

Facing the picture, Moore was riding on the footboard to the right with his back to the engine and tender. The engine was moving backward and Moore was facing in the direction in which the engine was moving. The edge of the footboard to Moore's left is exactly ten inches from the edge of the tender on that side (R. 43). He was standing behind the tender where he was supposed to stand in the performance of his duties (R. 21). He could not have stood closer to the edge of the tender on his left than 10 inches. The width of the tender is 10 feet, 1 inch (R. 42); its height 9 feet, 7½ inches (R. 42). The part of the tender which carries the coal projects still higher—3 feet and 11 inches at the side and 5½ feet higher at the center (R. 43). The footboard on which Moore was standing was 1 foot and ½ of an inch above the top of the rail (R. 42). From the top of the footboard to the top of the tender the distance was 8 feet and 7 inches (R. 43).

The engine was moving backward pulling 33 cars (R. 30) about 5 miles an hour (R. 19). While Moore was standing on the footboard of the tender, in the line of duty, the engineer applied the brakes and made a sudden stop, without any notice or warning to Moore (R. 24). When the engine and train came to a stop, it had run over and killed Moore. "An engine length, a car length and a small part of the second car in front of the engine," had passed Moore's dead body (R. 23).

Wilds, the engineer, was sitting on the engineer's seat box in the cab, with his back toward the direction in which the engine was backing, with his left hand on the throttle, his head turned to his right looking back out of the window in the direction in which the engine was moving (R. 20). "I was looking out of the window", he said, "and looking west to see if the switch were properly lined and there was

anything on the leadback, as a usual thing, you know" (R. 30).

Wilds said he saw Moore standing up straight on the footboard before the accident, and while thus standing, he started to slump straight down "as if his knees gave way like that, and straightened up" (illustrating) (R. 26). We quote:

> "Q. When he slumped he was standing straight and then when he straightened up he was still straight behind the tender?
> "A. Yes.
> "Q. On that step?
> "A. Yes.
> "Q. You were at that time moving?
> "A. I was.
> "Q. West as you said?
> "A. Yes.
> "Q. Then what did you do?
> "A. I didn't do anything at that time.
> "Q. You didn't do anything at that time.
> "A. That is right.
> "Q. What happened after that?
> "A. You want me to tell about his falling off?
> "Q. Yes.
> "A. The next thing I notice, his body was hitting the ground * * *" (R. 26)

Carl Torrence, plaintiff's expert, made measurements and took sight lines from the engineer's seat box with his left hand on the throttle, looking out of the window to the rear from a point as far as he could get his head out—with his left hand on the throttle. He said that he could not see a person standing on the footboard as Wilds said Moore was standing immediately before the accident (R. 46). See plaintiff's exhibit No. 6 (R. 80), showing the measurements and sight lines from the engineer's seat box to the point where Moore was standing (admitted R. 48). Torrence

was asked if he made any tests for the purpose of determining whether the engineer could see Moore and he said he did. We quote from his testimony as follows:

> "Q. May I ask if you sat in the engineer's seat and tested the situation yourself?
>
> "A. I did.
>
> "Q. Tell us about your sight?
>
> "A. From a point nine inches outside of the space of the cab, the sight line is obstructed at the back end of the tender and you would have no vision within that ten-inch space between the step and the edge of the tender. From the edge of the platform it would be obscured (R. 45).
>
> * * * * * * *
>
> "* * * did you place anybody on the footboard?
>
> "A. I did, sir.
>
> "Q. In what position did you place him before you made your observation—standing upright?
>
> "A. Standing upright, his foot on the edge of the step which was ten inches from the edge of the tender.
>
> "Q. A man standing straight?
>
> "A. Upright, straight. I could not see him when I put my head out of the side window.
>
> "Q. Did you put your head out as far as you could see?
>
> "A. As far as I could and still have my hand on the brake.
>
> "Q. The throttle?
>
> "A. The throttle, yes, sir" (R. 46-47).

Torrence further testified that if it were possible for a man to stick his head out further, for every foot further that he could get his head out, he would gain about a sixteenth of an inch more within the ten inches between the end of the step and the edge of the tender (R. 50).

The statement of Wilds that he could see Moore on the footboard, in the position described by him, is not only

contradicted by the physical facts—it is contradicted by Wilds himself. He admitted:

(1) That Moore was not in position to give him any signal, immediately before the accident (R. 37).

(2) That Moore was not giving any signal at the time of the accident (R. 22).

(3) That signals are given from the footboard where Moore was standing by reaching out from behind the tender (R. 24, 25).

(4) That if one should give a signal while standing up straight on the footboard behind the tender without reaching out from behind the tender, the signal could not be seen by the engineer. "Without his hand going out like that, you can't see the signal" (R. 25).

(5) That, notwithstanding he saw Moore standing up straight, slump straight down, and straighten himself up again behind the tender, he did nothing; the next thing he noticed being his body hitting the ground (R. 26).

(6) That he stopped the engine and train of 33 cars, moving at five miles an hour, within the length of the engine, a car length, and a small part of the length of the second car in front of the engine (R. 23, 29), without *air pressure* on the cars behind him, and that it would take longer to stop with "so much weight behind you," and without air pressure (R. 32).

(7) In addition to the statements set out above, Wilds, at the request of counsel, stood up straight before the jury behind a table, the edge of the table representing the edge of the tender on Moore's left, and demonstrated Moore's standing position, how he slumped straight down and then raised himself straight up and thereafter tumbled off of the engine (R. 27).

The jury was taken to the scene of the accident where the jurors were shown the engine No. 114 and allowed to make their own observations, and tests (R. 50, 51).

It will be observed that the plaintiff had no choice but to call Wilds, since he was the only eye witness known to her. Certain facts, other than the cause of Moore's fall, necessary to a recovery, could be established only by him. He was not only in the employ of the defendant, but was in the immediate control of the engine at the time of the accident. Plaintiff undertook to call him as an adverse witness, subject to examination, in accordance to the rule laid down in *Murphy's Hotel* v. *Cuddy's Administrator*, 124 Va. 207, 97 S. E. 794. The Court ruled that it did not necessarily follow, from the facts stated, that Wilds would be adverse; that if he proved to be adverse, then he might be examined according to the rules applicable to an adverse witness. Counsel for plaintiff stated that the reading of a pre-trial examination of Wilds would itself prove him to be adverse (R. 18). However, Wilds was not at first examined as an adverse witness. The examination proceeded for some ten or twelve pages, until Wilds hesitated to answer some of the questions as he had answered them on his pre-trial examination. His attention was then called to his previous testimony. Gradually, from that point on, counsel proceeded to examine Wilds as an adverse witness, without the slightest objection on the part of counsel for the defendant. It was during the course of the cross-examination that he gave the answers to the "standing up straight questions".

The Court of Appeals commenting on the testimony of the engineer, given under the circumstances related, said:

> "Any straightforward witness, if asked whether the figure of a man shown in the photograph alluded to above 'was standing up straight,' would normally answer 'yes,' as did the engineer when asked by counsel for the appellant if Moore was 'standing up straight.'

It is worthy of note that these words were the words of counsel and not of the witness" (R. 90).

The record shows that the engineer was asked to stand in front of the jury behind a table; assume the table to be the tender of the engine and then illustrate before the jury the position of Moore when he saw him and just exactly how Moore slumped straight down and then raised himself straight up. The witness then stood up straight and slumped straight down and raised himself up straight before the jury, just exactly as he said Moore had done.

If the words of the witness were the words of counsel and not of the witness, the actions of the witness before the jury when he slumped straight down and then raised himself straight up were not the actions of counsel. There is no evidence that counsel laid hands upon him and pressed him straight down, or that he caught hold of the witness and raised him straight up.

It is a part of the art of cross-examination for the cross-examiner to put words in the mouth of the witness, if he can do so. If the cross-examiner can get the witness to agree with him by the asking of leading questions, that is the cross-examiner's right. The case was tried before an able and experienced judge, with able and experienced trial counsel for the defense. There was no objection from the Court or counsel to the method of cross-examination.

The engineer had made statements upon a pre-trial examination. When called to the witness-stand, he endeavored to weaken the force of his previous statements. It was, therefore, the right of the cross-examiner to point out his former statements and seek to force the witness to admit, not only that he made the statements, but that they were true. Indeed, the proper way to examine a witness about his previous testimony is to call the previous testimony directly to the attention of the witness in the

words in which it was given and ask him if he did not so testify. Unless such a foundation is laid, counsel will not be permitted to contradict a witness. If such a cross-examination amounts to "verbal gymnastics not favored in the law", as said by the Court of Appeals, then all good cross-examiners are guilty of "verbal gymnastics."

In the statement of the court to the effect that any straightforward witness, "if asked whether the figure of a man shown in the photograph alluded to above was standing up straight, would naturally answer, 'yes', the court was referring to the photograph, defendant's exhibit B (R. 82). We here reproduce the photograph.



It plainly appears that this photograph was taken from an angle with the camera focused on the corner of the tender, the man standing with his left foot partly off of the edge of the step, his right hand holding to a grab iron and his body leaning to his left, so that his shoulder *appears* to extend beyond the edge of the tender. The picture is so distorted that the footboard on which the man is standing appears to extend over the iron rail on that side only about half as far as the footboard appears to extend beyond the rail on the other side. The inside end of the footboard on which the man is standing appears to extend practically to the middle of the rails of the track, while the other footboard appears to be almost entirely on the outside of the rail. Facing the picture, the rear light on the tender appears to be located halfway between the left and the center of the upper part of the tender, whereas, in fact, it is actually located in the center. Yet, the court says, looking at the man standing on the tender, "Any straightforward witness, if asked whether the figure of a man shown in the photograph alluded to above 'was standing up straight,' would normally answer 'yes.' as did the engineer when asked by counsel for the appellant if Moore was 'standing up straight.'"

We submit that no straightforward witness would say that the man shown in this photograph was "standing up straight." It is clear that he is leaning to the outside and holding on to the rail to keep from falling. His left foot is partly over the end of the footboard and his right foot is only a few inches from the edge. From this evidence the court says that the engineer could see Moore. *But* according to evidence of the engineer which we have quoted, and which the Jury accepted, Moore was not standing in any such position. Moreover, the taking of the photograph from the angle from which it was taken, with the camera

focused on the corner of the tender, makes it *appear* that the engineer could see more than he could in fact see.

A photograph taken in the ordinary way usually is an accurate record of the image cast by the lens upon the film, but as distortion is possible through the manner in which the camera or negative is used, before a photograph is admitted in evidence there should always be preliminary proof that it is a correct representation of the subject. No such proof was offered in this case with reference to photograph designated as "Defendant's Exhibit B." The general rule is that after a photograph has been verified and admitted in evidence, the jury should determine what credit or weight should be given it as evidence. Photographic Evidence by Scott, page 496.

The rules for creating accurate photographs of accident scenes or objects are not complicated, but they are important. Different impressions may be created by merely turning the camera to the right or left in order to show a slightly different view. For instance, let us assume that an automobile collision occurs at a city intersection. One of the drivers, contending his view was obstructed in such a way that he could not see the other car approaching on the intersecting street, presents a photograph tending to support his theory. In this picture it appears that the view of the intersection would be obstructed by the building at the right. The camera was simply placed in such a position that the building on the extreme right appeared to obstruct the view. Another photograph made with the camera turned more to the right shows that because of its unique construction the building really does not create a blind intersection. See illustration Photographic Evidence, Scott, pp. 61, 62, 63.

In the present case, defendant's photograph Exhibit B was created with the camera turned and placed so as to

show that the engineer could see Moore, but the view represented by the photograph was not correct. The jury ignored it, and the appellate court had no right to regard it as controlling.

The court declined to say what would have been the result had appellant demonstrated, in the opinion of the court, that the engineer could not see Moore on the footboard, saying:

> "We do not need to decide what might have been the result had appellant actually demonstrated that the engineer could not see Moore in the position the latter occupied on the footboard. We think the evidence, fairly interpreted, shows without contradiction that he *could* see him. Any straightforward witness, if asked whether the figure of a man shown in the photograph alluded to above was 'standing up straight', would normally answer 'yes', as did the engineer when asked by counsel for appellant if Moore was 'standing up straight'" (R. 90).

In this connection, it is worthy of note that the engineer, Wilds, was sitting on the engineers' seat box in the cab with his left hand on the throttle, looking back out of the window in the direction in which he was moving—that is west (R. 30). "I was looking out of the window," he said, "and looking west to see if the switch were properly lined and there was anything on the leadback as a usual thing, you know" (R. 30). He said he didn't know whether he was going to take all of the thirty-three cars out through the switch at one time. "I don't know about that. I work by signals. I don't know whether they intended to put them all out and switch them or *stop* and cut part of them off" (R. 30) (Emphasis added). He said he didn't recall whether there was at the time a switch tender on duty at the point where the switch track comes out into the ladder track (R. 29). (A switch tender is one who is required to

throw switches.) (R. 29). He said he couldn't recall whether the brakeman, 'Cliff Stephens,' who sometimes acts as switch tender, was on duty that day (R. 29), nor could he recall whether anyone was around the switch at the time, "looking after that switch, immediately before the accident"—the one he was coming out of (R. 30).

The jury had a right to infer that the engineer, not seeing Moore on the footboard (since he was not reaching out giving any signal) and not seeing a switch tender or anyone else around the switch and not knowing whether they intended to take all of the thirty-three cars out of the switch at one time, or stop and cut some of them off, decided to make an emergency stop. He did in fact make such a stop, without any notice whatsoever to Moore. The jury had a right to infer that the sudden, unexpected stop threw Moore forward from the footboard on the tender and that the engineer did not see him until his falling body emerged from behind the tender and was "hitting the ground." "I saw his body when it hit the ground," the engineer said.

It is true the engineer said he saw Moore just before he fell and that he was standing up straight on the footboard behind the tender; that he started to slump straight down behind the tender as if his knees gave way; that he straightened up, still straight behind the tender and "the next thing he noticed his body was hitting the ground," "a little bit to the outside" of the engine, and that he "applied the brakes just as the body was hitting the ground." But the jury did not have to believe this part of the engineer's testimony, because it was in conflict with his several admissions that he could not see Moore while on the footboard unless he was reaching out from behind the tender giving a signal and that he had not given any signal since giving the back-up signal at the beginning of the operation, and

that he was not in a position to give a sigral. Such testimony was also in conflict with that of Torrence which was to the effect that it was physically impossible for the engineer to have seen Moore standing up straight on the footboard, as the engineer said he was standing. Such testimony is also in conflict with the inference that if the engineer had seen Moore standing up straight behind the tender, slump straight down, and then raise himself up, he would have applied the brakes at that time, instead of waiting until Moore was hitting the ground. He said he did nothing until Moore's body was practically hitting the ground. The jury did not believe this statement. In addition to all of the foregoing, the jurors were allowed to view and inspect the engine and tender and make their own observations and tests in order that they might properly weigh and evaluate the testimony in determining whether the engineer could see Moore standing on the footboard behind the tender. Their verdict indicates the result.

The inference to be drawn from these circumstances was strengthened by the failure of the defendant to call Holland, the conductor who was in charge of the work. (R. 31). Such failure gave rise to a presumption or inference that had he testified, his testimony would have been against the defendant. In *Puckett, et al*, vs. *Draper*, 158 S.E. 68, 156 Va. 238, it is said:

> "'It seems plain to us that there is a stronger presumption to be raised against a party in whose possession the facts must be, if they exist, by which suspicion would be removed and all questions as to the propriety of his conduct be set at rest, who stolidly refuses, without the suggestion of a reason, to aid the court in arriving at the truth.'
>
> "In Wigmore on Evidence, vol. 1 § 285, it is said: 'The non-production of evidence that would naturally

> have been produced by an honest and, therefore, fearless, claimant, presents the inference that its tenor is unfavorable to the party's cause.' "

In *Woods* v. *Graf*, 84 Fed. Supp. 893, the Court said that conduct which forms a basis for an inference is evidence; that silence is often evidence of the most persuasive character; citing *Belokamsky* v. *Todd*, 44 SCR 94, 263 U.S. 149; *Runkle* v. *Burnham*, 14 SCR 837, 153 U.S. 216; *Kirby* v. *Talmadge*, 16 SCR 349, 16 U.S. 179. All evidence, the Court said, is to be weighed according to the proof which it was in the power of one side to have produced and in the power of the other side to have contradicted. Citing *Cooper* v. *Dasher*, 290 U.S. 106, 109, 54 Sup. Ct. Rep. 6, 7, citing *Kirby* v. *Talmadge*, 160 U.S. 379, 383, 16 SCR 349.

In the case of *Johnson* v. *United States*, 333 U.S. 46, 68 Sup. Ct. 391, two fellow workers were the only available witnesses, the plaintiff and his co-worker. The plaintiff testified in his own behalf. Neither party, for reasons of its own, called plaintiff's co-worker. Mr. Justice Frankfurter, in the course of a dissenting opinion, said, in part:

> "A trial is not a game of blind man's bluff * * * Federal Judges are not referees at prize fights but functionaries of justice. * * * A Federal Judge * * * has the power to call and examine witnesses to elicit the truth. * * * Instead of entering judgment for the party who had the burden of proof and did not meet it, the Trial Judge should at least have called Dudder (co-worker) as the court's witness. * * * If neither party will risk calling a witness who knows important facts, it is in the power of the court to call and examine such a witness, in the interest of truth and justice, allowing both parties the right of cross-examination and impeachment."

The plaintiff thought she had made out a case for the jury without calling the conductor. The Judge evidently

thought so, because he submitted the narrow issue squarely to the jury. If the Judge changed his mind after the jury had drawn the inference of negligence, the common law required him to award a new trial in setting aside the verdict of the jury so that the plaintiff might call Holland or introduce expert testimony that the engineer could not possibly have stopped the train as quickly as he did (pulling 33 cars without air pressure), unless he had applied the brakes before he saw Moore's body emerging from the side of the tender hitting the ground. Such a course would have been "according to the rules of the common law," as the Constitution provides.

It is true the plaintiff summoned the conductor. But why should plaintiff call the defendant's employee who was in charge of the work, unless compelled to do so? The plaintiff had already produced evidence from which the jury could infer that Moore was thrown from the engine by the sudden stop without notice and run over and killed.

In *Gray* v. *Southern Pacific Company*, 145 P. 2d 561, plaintiff's theory was that the deceased was knocked from the top of a box car while in the performance of his duties as a brakeman by the negligent stopping of the train without warning.

After the train in question had stopped for water, it proceeded forty or fifty car lengths and attained a speed of about eight miles an hour, and was then brought to a stop by the engineer by the application of air throughout the train. The train traveled about five car lengths from the time the air brakes were applied before it stopped. Following the stop, deceased was found dead, his head and left forearm having been severed from the body. His body was found at about the fortieth car from the head of the train; his forearm was found leaning against the inside of the south rail of the tracks under the thirty-fifth car.

There thus were five cars between his body and arm or the same distance that the train traveled from the time of the application of the brakes to the stop.

From the other circumstantial facts, it was deduced that the deceased was at the thirty-fifth car from the head of the train at the time of the occurrence of the event that caused his death. There was evidence that the custom or practice was for the head brakeman, under the circumstances presented, to inspect the first half, or the first thirty-four to thirty-five cars of the train from the ground as it rolled out of the station, giving special attention to whether the brakes were sticking on the wheels of any of the cars, or whether any wheels were sliding. After the portion of the train subject to his inspection had rolled past, he would board the train, going on top of the cars to give or receive signals.

The law of the case was stated as follows:

> "It is wholly reasonable to conclude that on the occasion in question the decedent was performing those duties, had inspected his portion of the train and boarded the thirty-fifth car. That conclusion is consistent with evidence which is susceptible of the interpretation that the maximum speed of eight miles per hour for a train pulling out of a station is designed to enable trainmen who are making a rolling inspection from the ground to board the train after completion of that duty. Also, the evidence shows that deceased was characterized as an excellent brakeman, always willing to do his part and was active and competent, hence, likely to be performing his duties. The foregoing circumstances are sufficient to place decedent on the thirty-fifth car, and sustain the inference that he fell from that car. With reference to the presence of deceased on the train, without regard to the particular portion thereof, defendant admits in its answer that at the time of the accident deceased was on the top of one of the freight cars of the train in the course of his

employment and that he was run over by the train. Thus, if the defendant was negligent in stopping the train and that negligence was the proximate cause of his death, there is sufficient evidence to support the verdict. The foregoing circumstances clearly furnish a basis for concluding that the stopping of the train was the cause of the accident, particularly the location of the body and the location and position of the forearm. They reasonably establish as a fact that the accident occurred while the train was in the process of stopping."

The Court, with reference to evidence supporting defendant's contentions that deceased fell before the stop while crossing without a lantern from one car to another enroute to the engine, said:

"The most that can be said of such evidence is that it created a conflict in the evidence or involved the credibility of the witnesses or the weight of the evidence, all matters which were resolved against defendant by the jury and with which we are not concerned on appeal. In addition to the circumstances heretofore related as supporting the jury's verdict, there are other circumstances which mitigate against defendant's version of the accident. Although it was a dark night, the weather was warm and dry and as far as appears the cars were in good condition. Deceased was a brakeman of many years' experience, was an alert, agile and able workman, and the tracks traversed were in good condition and decedent was familiar with them and the character of the train involved. All of those circumstances carry inferences which rebutt the assumption that deceased fell when going from the top of one car to another without the intervention of any unusual occurrence."

As to the credibility of the witnesses, the Court said:

"In determining the disputed question of fact presented at the trial of the case it was the province of the

jury to disbelieve any testimony which appeared to them to lack verity. They were the exclusive judges of the credibility of the witnesses and the weight to be given the testimony. They could reject positive testimony and accept circumstantial evidence as proof of the facts, as it is elementary that direct evidence may be disbelieved and contrary circumstantial evidence relied upon to support a verdict of finding. *Barkham* v. *Widing*, 210 Cal. 206, 291 P. 173; *Parsons* v. *Easton*, 184 Cal. 764, 195 P. 419.

"The foregoing discussion has to do with the manner, and place in which the deceased met his death. There is evidence from which an inference may be drawn that he was on the 35th car, and that he fell therefrom some time between the application of the brakes and the stop, and that there was a definite link of causation between the stop and the fall. It remains then to determine whether or not defendant was negligent in making the stop, and hence liable. There is considerable discussion in regard to whether the stop was unusual. It is defendant's claim that the stop was made to ascertain the whereabouts of the deceased. There is evidence that such a stop was not a common occurrence and certainly it was not to be expected at least as far as the deceased was concerned. There is nothing to indicate that he was aware that a stop was going to be made. The stop was not for any emergency. * * * In view of the custom and practice requiring the deceased to make a rolling inspection of the train and board about the 35th car, the engineer in the lead engine should have known that the deceased in the course of his duty was on the top of the train at the time it was stopped. Those circumstances also negative the reason advanced by the engineer for the stop, that is, that it was due to the absence of deceased from the cab of the lead engine. While there is evidence by several witnesses that the stop was gradual and easy and without a jerk in the cars there are circumstances from which the jury could have inferred that the stop would probably have caused some jolting. Before the stop practically all of the slack between the

cars had been taken up. Although there is evidence that the proper application of the air brakes throughout the train results in a uniform braking to avoid jerking, the element of the slack resulting from stopping is an element to be considered. An application of air at a slow speed creates a greater shock than at high speed."

To support its conclusions, the Court quoted at length from *Tenauf* v. *Peoria etc. Ry. Co.*, 64 Sup. Ct. 409.

In *Kurimsky* v. *Unity Rys. Co.*, 55 A. 2d 378, a brakeman was killed during switching operations when he was jolted off one of the cars as a result of engineer making sudden stop of the train to throw a caboose, without advising the brakeman of the change of orders for a switching movement.

> "The Court submitted to the jury whether 'there was a sudden jerk or jolt or jar of this train which threw Kurimsky from the train and to the tracks, in such manner as to cause his death?' The Judge also said, 'If there was no sudden or unusual jerk or jolt of any kind, then of course there is no negligence in this case and the plaintiff's case fails.'"

There was a verdict for the plaintiff, and the question on appeal was whether the evidence was sufficient to authorize the jury finding that the negligence of the railroad company was the proximate cause of the brakeman's death under the Federal Employers' Liability Act? The facts in the case appear from the following statements taken from the opinion of the Court:

> "The body of Stephen Kurimsky, who had been working as an extra brakeman in a crew engaged in switching empty coal cars, was found under the locomotive about 6:30 P.M., November 30, 1944. His administratrix sued under the Federal Employers' Liability Act, and alleged that his death resulted in negligence in changing orders during a shift operation without notice to him. She recovered a verdict. Defendant now complains that judgment N.O.V. was refused.

"There were five men in the crew in charge of a caboose, a locomotive and tender. The conductor ordered a shift of seven empty coal cars from track 2 to track 1, parallel tracks extending north and south. Witnesses said it was dark, very windy, slippery, and snowing. With the caboose attached to the front, or north, end of the locomotive, they moved south on track 2, automatically coupled the tender to the seven cars and pulled them northward, crossing switch 2 on defendant's road and cross-over switch connecting the B. and L. E. Railroad to a point where the train stopped preparatory to pushing the cars southward onto track 1, where they were to be left. To facilitate that move, Kurimsky threw switch 2 to allow the train to pass to track 1, and then gave a lantern signal to proceed. The signal was relayed forward to the locomotive engineer, some three hundred feet way, who then started his train southward to cross over to and leave the cars on track 1. Kurimsky was last seen alive standing at or about switch 2. There is evidence from which the jury could find that it was his duty to board the train as it passed him at that point on his way southward and, when they reached the point where the cars were to be left, to set the brakes on the lead car to keep them in place on track 1 and then to come forward and uncouple the cars from the tender and engine. * * *

"After Kurimsky gave the lantern signal that the switch was set for the shift to track 1, and after that movement began, the conductor-by-signal to the engineer, ordered the caboose, which was in the front of the locomotive to be uncoupled. To comply with that order, the engineer had to reduce his speed and come to a stop or near stop to allow a trainman to uncouple the caboose. There is evidence that from a speed of ten miles per hour the train came to a stop in a few seconds. This sudden stop, which interrupted the movement to track 1, plaintiff contended caused Kurimsky to fall to the track from the car, on which it was his duty to ride. * * *

"The engineer testified that the order to throw off the caboose was a sudden order. He was asked, Q. Not being aware that the order was going to be given, the suddenness of that order would have something to do with the suddenness with which you reduced your speed? A. That is right. Q. And that, in turn, would affect the amount of jerk on the cars? Isn't that right? A. Possibly would, yes. He said to detach the caboose was a matter of a few seconds."

The Court stated the law of the case as follows:

"In the absence of evidence to the contrary, it is presumed that he did his duty and got on the train as it passed. Compare Tennant v. Peoria etc. Ry. Co., 321 U. S. 29, 34, 64 S. Ct. 409, 88 L. Ed. 520. When, after the train stopped on track 1, Kurimsky did not appear to uncouple the cars from the tender, a search was made for him and he was found under the engine.

"Appellant contends that the distances traveled by the train during the described movements demonstrate that the change in the order required to detach the caboose could not have resulted in Kurimsky's falling through or between cars to the track at or near the points where he and his lantern were found. The witnesses, whose statements were not consistent with each other, did not testify concerning locations and distances with mathematical exactitude; it was, however the duty of the jury to find the facts from their evidence. The jury could find that Kurimsky was on the train for the purpose of performing his duty; that he was not advised of the change of orders for the switching movement; that the sudden stopping, in the circumstances, may have jolted him off the train, whereas, if he had known of the change of orders, he might have been prepared for and have avoided the danger. The evidence brought the case within the statute. Compare Tennant v. Peoria, etc. Ry. Co. 321 U. S. 29, 64, S. Ct. 409, 88 L. Ed. 520; Lavender v. Kurn. 327 U. S. 645, 66 S. Ct. 740, 90 L. Ed. 916; De Lellis v. Pittsburgh & L. E. R. Co., 350 Pa. 436, 39 A. 2d 588, which considered the

failure to warn of an unusual switchover of an eastbound train to a westbound track."

In the *Gray* case, the defendant was operating a freight train consisting of two engines, sixty-two cars and a caboose. At the time of the accident the train was moving at eight miles an hour. The train traveled 250 feet from the time the air brakes were applied before it stopped. In this case if the engineer applied his brakes *after* Moore started to fall, the train was stopped within the length of the engine, one car length and a half of another car length, thirty-six to forty feet being a car length (R. 23, 29). That appears to be an unusually short distance within which to stop thirty-three cars moving at a speed of five miles an hour without air pressure. The engineer was asked to state the distance in which he could ordinarily stop, while traveling five miles an hour, by an emergency application of the brakes, and he refused to give an opinion on the subject (R. 23, 24). He was an experienced engineer and there is only one reason why he should not have answered the question, and that is, his answer would have stated a distance greater than an engine length, a car length and a half of a car length, and would have thus shown that he applied the brakes before Moore started to fall.

The cases involving the question whether a sudden stop or jerk constitutes negligence are collected in Note 89, page 75, and Note 29, page 154 of Volume 10A, Federal Code Annotated. Many of the cases cited were decided before the doctrine of assumption of risk was completely abolished by the 1939 Amendment to the Federal Employers' Liability Act. Under the Act, as amended, no element of assumption of risk could possibly be involved.

The facts proven in the instant case as a basis for the inference of negligence and proximate cause were stronger than the facts proven in the case of *Lavender* v. *Kuhn*, 327

U. S. 645, 66 S. Ct. 740, which were held to be sufficient by this court. In that case the deceased was struck on a dark night in the back of the head and killed. There were no eye witnesses. Plaintiff claimed that the deceased was struck by the tip of a mail hook hanging down on the outside of the mail car of the backing train. This end was seventy-three inches above the top of the rail, which was seven inches high. The end of the mail hook would sometimes swing out twelve to fourteen inches from the rail and seventy-three inches above the top of the rail. The deceased was only sixty-seven and one-half inches tall. Near the switch where the duties of the deceased required his presence was a mound of cinders and dirt rising at its highest points eighteen to twenty-four inches above the top of the rail. If the deceased had been standing on the mound about a foot from the side of the mail car, he could have been hit by the end of the mail hook. The defendant's theory was that the deceased was murdered. The jury found for the plaintiff in the sum of $30,000.00. Judgment was entered accordingly. On appeal the Supreme Court of Missouri reversed the judgment. Certiorari was granted by the Supreme Court of the United States and upon the hearing the Missouri Supreme Court was reversed. Mr. Justice Murphy, speaking for the Court, among other things said:

> "The Supreme Court, in upsetting the jury's verdict against both the Frisco trustees and the Illinois Central, admitted that 'It could be inferred from the facts that Haney could have been struck by the mail hook knob if he were standing on the south side of the mound and the mail hook extended out as far as 12 or 14 inches.' (189 S. W. 2d 255.) But it held that 'all reasonable minds would agree that it would be mere speculation and conjecture to say that Haney was struck by the mail hook,' and that 'plaintiff failed to make a submissible case on that question.' It also ruled that there 'was no sub-

stantial evidence that the uneven ground and insufficient light were cause or contributing causes of the death of Haney.' "

"The evidence we have already detailed demonstrates that there was evidence from which it might be inferred that the end of the mail hook struck Haney in the back of the head, and inference that the Supreme Court admitted could be drawn. That inference is not rendered unreasonable by the fact that Haney apparently fell forward toward the main Frisco track so that his head was 5½ feet north of the rail. He may well have been struck and then wandered in a daze to the point where he fell forward. The testimony as to blood marks some distance away from his head lends credence to that possibility, indicating that he did not fall immediately upon being hit. When that is added to the evidence most favorable to the petitioner as to the height and swing-out of the hook, the height and location of the mound and the nature of Haney's duties, the inference that Haney was killed by the hook cannot be said to be unsupported by probative facts or to be so unreasonable as to warrant taking the case from the jury.

"It is true that there is evidence tending to show that it was physically and mathematically impossible for the hook to strike Haney. And there are facts from which it might reasonably be inferred that Haney was murdered. But such evidence has become irrelevant upon appeal, there being a reasonable basis in the record for inferring that the hook struck Haney. The jury having made that inference, the respondents were not free to relitigate the factual dispute in a reviewing court. Under these circumstances it would be an undue invasion of the jury's historic function for an appellate court to weigh the conflicting evidence, judge the credibility of witnesses and arrive at a conclusion opposite from the one reached by the jury. See Tiller v. Atlantic Coast Line R. Co., 318 U. S. 54, 67, 68, 63 S. Ct. 444, 451, 87 L. Ed. 610, 143 A. L. R. 967; Bailey v. Central Vermont R. R. Co., 319 U. S. 350, 353, 354 63 S. Ct. 1062, 1064, 87 L. Ed. 1444; Tennant v.

Peoria & P. U. Ry. Co., 321 U. S. 29, 35, 64 S. Ct. 409, 412, 88 L. Ed. 520. See also, Moore, 'Recent Trends in Judicial Interpretation in Railroad Cases Under the Federal Employers' Liability Act,' 29 Marquette L. Rev. 73.

"It is no answer to say that the jury's verdict involved speculation and conjecture. Whenever facts are in dispute or the evidence is such that fair-minded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference. Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear. But where, as here, there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion. And the appellate courts function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable."

No phase of negligence law offers greater resistance to logical treatment than the much discussed question of proximate cause, as was so well said by Circuit Judge Evans in *Eglsaer* v. *Scandrett* (7th Cir.), 151 F. 2d 562. Judge Evans then quotes from *Tennant* v. *Peoria, etc. Co.*, 321 U. S. 29, 64 S. Ct. 409, as follows:

"'The focal point of judicial review is the reasonableness of the particular inference or conclusion drawn by the jury. It is the jury, not the court, which is the fact-finding body. * * *

"'Upon an examination of the record we cannot say that the inference drawn by this jury that respondent's negligence caused the fatal accident is without support in the evidence. Thus to enter a judgment for respondent notwithstanding the verdict is to deprive petitioner

> of the right to a jury trial. No reason is apparent why we should abdicate our duty to protect and guard that right in this case.' "

After thus quoting from the *Tennant* case, Judge Evans continues, in part:

> "Under the old concept of proximate cause, that cause must have been direct, the complete, the responsible, the efficient cause of the injury. Contributing and remotely related causes were not sufficient. Now, if the negligence of the railroad has 'causal relation,'— if the injury or death resulted '*in part*' from defendants' negligence, there is liability."

In the *Eglsaer* case, the evidence was that the engineer had climbed on to the cat walk of the engine to repair a defective bell ringer; that he had fallen to the ground; that the cat walk was slippery and dirty; and that a loose rope was lying adjacent to the bell ringer; and the court held the evidence sufficient from which the jury could draw the inferences supporting the finding that the defective bell ringer was at least in part the cause of the engineer's death, and that the jury's finding that the defective bell ringer was the proximate cause of the engineer's death was not objectionable as to allowing speculation to do duty for probative facts. See Vol. 4, NACCA Law Journal, pages 203, 204, 205.

As a whole, the right of trial by jury seems now to be crystalizing into a legal necessity enjoying the sanction of this Honorable Court "unless there be manifestly a woeful lack of evidence which could leave a jury nothing but speculation." 3 NACCA Law Journal 196. The historic role of the jury in performing that function is being restored in this important class of cases. Id. p. 197.

"For the outstanding studies on the jealously guarded right of trial by jury in these cases as opposed to the

instructed verdict against the employee, the following cases make exceptionally good literature in illustrating that trial by jury is not a privilege of the employee but is a *constitutionally guaranteed demand*. Trust Co. v. Erie R. R., 165 F. 2d 806; Galloway v. U. S., 319 U. S. 372, 397, 398, 399; Tarter v. U. S., 17 F. Sup. 691, 692, 693; Owens v. Union Pacific R. R. Co., 319 U. S. 715, 724; Bailey v. Central Vermont Ry., Inc., 319 U. S. 350, 353; Tiller v. A. C. L. Ry. Co. 318 U. S. 54; Blair v. B. & O. Co., 323 U. S. 600, 602; Lavender v. Kurn, 327 U. S. 645, 652, 653; and lastly, of course, Wilkerson v. McCarthy, 336 U. S. 53, a decision which should be honored from now on in deciding issues similarly involved in future cases" (Italics supplied). 3 NACCA Law Journal, p. 198.

The "constitutionally guaranteed demand" referred to is, of course, the seventh amendment, which provides:

> "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

This section is a prohibition to the courts of the United States to reexamine any facts tried by a jury in any manner other than according to the rules of the common law. The only modes known to the common law to reexamine such facts are the granting of a new trial by the court where the issue was tried or to which the record was properly returnable, or the award of a *venire facias de novo*, by an appellate court, for some error of law which intervened in the proceedings.

In *Solem* v. *New York Life Insurance Co.*, 228 U. S. 364, 33 Sup. Ct. 523, this Court, in an able and exhaustive opinion, after reviewing the authorities at length, said:

"'The trial by jury is justly dear to the American people. It has always been an object of deep interest and solicitude, and every encroachment upon it has been watched with great jealousy . . . One of the strongest objections originally taken against the Constitution of the United States was the want of an express provision securing the right of trial by jury in civil cases. As soon as the Constitution was adopted, this right was secured by the 7th Amendment of the Constitution proposed by Congress; and which received an assent of the people so general as to establish its importance as a fundamental guaranty of the rights and liberties of the people.' And then coming to the clause, and 'no fact tried by a jury shall be otherwise re-examined in any court of the United States,' than according to the rules of the common law,' he continued (pp. 447, 448): 'This is a prohibition to the courts of the United States to re-examine any facts tried by a jury in any other manner. The only modes known to the common law to re-examine such facts are the granting of a new trial by the court where the issue was tried, or to which the record was properly returnable; or the award of a venire facias de novo, by an appellate court, for some error of law which intervened in the proceedings.'

"In Walker v. New Mexico & S. P. R. Co. 165 U. S. 593, 596, 41 L. ed. 837, 841, 17 Sup. Ct. Rep. 421, decided in 1897, where the Amendment was again under consideration, it was said by this court, speaking through Mr. Justice Brewer: 'Its aim is not to preserve mere matters of form and procedure, but substance of right. This requires that questions of fact in common-law actions shall be settled by a jury, and that the court shall not assume, directly or indirectly, to take from the jury or to itself such prerogative . . . Now a general verdict embodies both the law and the facts. The jury taking the law as given by the court, apply that law to the facts as they find them to be, and express their conclusions in the verdict. The power of the court to grant a new trial if, in its judgment, the jury have misinter-

preted the instructions as to the rules of law, or misapplied them, is unquestioned, as also when it appears that there was no real evidence in support of any essential fact. These things obtained at the common law; they do not trespass upon the prerogative of the jury to determine all questions of fact.'

"In Capital Traction Co. v. Hof, 174 U. S. 1, 13, 43 L. ed. 873, 877, 19 Sup. Ct. Rep. 580, decided in 1899, the subject was much considered, and, following a careful review of the prior decisions, it was said by Mr. Justice Gray, who spoke for the court: 'It must therefore be taken as established, by virtue of the 7th Amendment of the Constitution, that either party to an action at law (as distinguished from suits in equity or in admiralty) in a court of the United States, where the value in controversy exceeds $20, has the right to a trial by jury; that, when a trial by jury has been had in an action at law, in a court either of the United States or of a state, the facts there tried and decided cannot be re-examined in any court of the United States, otherwise than according to the rules of the common law of England; that by the rules of that law, no other mode of re-examination is allowed than upon a new trial, either granted by the court in which the first trial was had or to which the record was returnable, or ordered by an appellate court for error in law; and therefore that, unless a new trial has been granted in one of those two ways, facts once tried by a jury cannot be tried anew, by a jury or otherwise, in any court of the United States.'"

Referring to taking a case from the jury by demurrer to the evidence, the Court said:

"(b) Such a demurrer is permissible only when proposed by one party, joined in by the other, and allowed by the court. It must contain an express and distinct admission by the demurrant of every fact which the evidence of his adversary conduces to prove, else he cannot insist that the latter join in the demurrer; and the admission, to be effective to that end, must be of

the facts, and not merely the evidence from which their existence is inferable. (c) When the matter of fact is so ascertained and shown in the demurrer, the case is deemed ripe for judgment in matter of law, and the jury properly may be discharged from giving a verdict."

Without regard to whether Rule 50 of the Federal Rules of Civil Procedure accomplishes indirectly that which cannot be done directly, it is certain that the rule was never intended to grant to the courts the power of weighing the contradictory evidence, drawing inferences, judging the credibility of witnesses, and drawing ultimate conclusions as to the facts, contrary to those drawn by the jury. Such an interpretation of the rule would bring it in conflict with the constitutional provision.

Conclusion

Moore lost his life while he and the defendant were both engaged in interstate commerce. He was riding on the footboard of the tender on the rear of engine No. 114 in the performance of his duties. The footboard was behind the tender 10 inches from the edge on the engineer's side. The engineer was backing in a westerly direction, about five miles per hour, pulling thirty-three cars, without air pressure, intending to come out of track No. 12 into the ladder track. Moore had given the back-up signal for this movement by reaching from behind the tender while standing on the footboard. While Moore was thus riding, the engineer applied his brakes and stopped the train suddenly without warning to Moore. When the train came to a stop, Moore was found lying on the ground, having been run over by the engine. "An engine length, a car length, and a small part of the second car in front of the engine" had passed Moore's dead body. These facts are not contradicted. The doctor stated that Moore died from the injuries sustained in the accident.

While the engineer testified that he saw Moore standing up straight on the footboard before he started to fall, the physical facts showed that he could not have seen Moore while he was thus standing there. Several admissions made by Wilds on cross-examination were to the effect that he could not have seen Moore standing on the footboard. The jury, therefore, disregarded the engineer's testimony to the effect that he saw Moore on the footboard before he commenced to fall and thereafter applied the brakes. With this testimony of the engineer out of the case, there was left the admitted fact that the engineer applied the brakes suddenly, without warning to Moore, for some *other* reason, and that when the train came to a stop, Moore was found mortally injured about where he

would have been expected to fall from a sudden stop, without warning.

It is true that Moore had suffered a heart attack thirteen months before the accident, but he recovered promptly and was permitted by the defendant company to go back to work. He had suffered no recurrence of the injury. In the accident his neck was broken, his left arm severed, several of his ribs fractured and his lungs punctured (R. 11). The physician who examined the body certified that death was due to the injuries sustained in the fall (R. 12).

The questions of negligence and proximate cause were, therefore, jury questions. To deprive the plaintiff of the benefits of the verdict of the jury was to deny her a right guaranteed to her under the Seventh Amendment to the Constitution.

Respectfully submitted,

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